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IN THE

Supreme Court of the United States

GREAT-WEST LIFE & ANNUITY INSURANCE CO., EARTH SYSTEMS, INC., AND THE HEALTH AND WELFARE PLAN FOR EMPLOYEES AND DEPENDENTS OF EARTH SYSTEMS, INC.,
Petitioners,

v.

JANETTE KNUDSON AND ERIC KNUDSON,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF THE JUDGMENT BELOW BY INVITATION OF THE COURT

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QUESTION PRESENTED

Whether petitioners' suit for money allegedly due under an ERISA plan reimbursement provision is an action for "appropriate equitable relief" under Section 502(a)(3) of ERISA.

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF THE JUDGMENT BELOW BY INVITATION OF THE COURT

Pursuant to this Court's order dated March 19, 2001, this brief is submitted in support of the judgment of the Ninth Circuit in this case.

STATEMENT

In this case, as in many others, a beneficiary of an employer-sponsored medical plan, covered by the Employee Retirement Income Security Act of 1974 (ERISA), was injured in an accident, and the ERISA Plan paid for her medical expenses. The beneficiary filed and pressed a state-court tort action against alleged tortfeasors to recover damages, including for many items, such as future medical expenses and lost earnings (from what here was a life-altering injury), not paid for by the Plan. Neither the ERISA Plan nor

its representatives assisted or participated in the state-court action, even after receiving notice of a settlement proceeding in which liens on the recovery would be paid. Instead, alleged fiduciaries of the ERISA Plan initiated a second action, in federal court, under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), invoking a reimbursement provision of the ERISA plan to demand payment from the injured beneficiary of the amount the Plan had expended for her medical care.

The district court in this case, agreeing with the injured beneficiary, held that the particular plan provision at issue allowed reimbursement only out of the third party's settlement payments made for past medical expenses, not out of the payments made for (a small portion) of other (amply documented) losses. The court of appeals did not decide the proper interpretation and application of the plan reimbursement provision at issue. It held instead that this action for money was not within ERISA § 502(a)(3)'s authorization for a fiduciary to sue for "appropriate equitable relief."

A. Petitioners and the Plan

In 1981, petitioner Earth Systems, Inc., an employer, established an employee benefit plan to provide medical benefits for its employees and their dependents, subject to ERISA and California law. JA 189-90, 204. Earth Systems established a formal Trust to carry out the plan, and trustee Jerol Brown identified the Trust as the legal entity constituting the Plan, a petitioner here. JA 177, 187. The "only plan documents" were the 1981 Trust Agreement and a Summary Plan Description. JA 207.

The Trust Agreement obliges Earth Systems to pay to the Trust the amounts needed for the Trust to pay claims (JA 190), while also allowing the Trust to purchase insurance directly for the beneficiaries (JA 198). The Agreement states that Earth Systems' board of directors had "appointed a

Board of Trustees (the 'Trustees') to administer the Plan" (JA 189) and that "[t]he Trustees . . . shall be the Plan Administrator as defined in Section 3(16)(A) of ERISA [29 U.S.C. § 1102(16)(A)] and the fiduciary with the rights, powers, duties, responsibilities, discretion and immunities set forth in the Plan" (JA 192). The trustees had "the authority to direct the investment, management and control of Trust assets" (JA 192), to appoint agents as needed to carry out their duties (JA 193), and to exercise a broad range of general powers to operate the Trust (JA 195-200).

The second relevant plan document is the Summary Plan Description (the "Booklet"), which is excerpted at JA 54-66. The Booklet identifies Earth Systems, Inc. as the "Policyholder/Employer," names "Denise Shelton, Human Resources Manager, Earth Systems, Inc." as the "Plan Administrator," and defines the terms of the benefits plan at the relevant time. JA 61-62. Immediately after a provision for "co-ordination of benefits"—"to correct overcoverage which occurs when a person has health coverage for the same expenses under two or more" plans providing benefits (JA 54)—the Booklet sets forth a "Provision for Right of Recovery," which is the basis for the present lawsuit. JA 58-59.

The provision first states that "[a] third party may be liable or legally responsible for expenses incurred by a Covered Person for[] an illness; or a sickness; or a bodily injury." JA 58 (boldface omitted throughout this paragraph). In that case, the Plan will "pay any benefits which are payable for the expenses incurred by the Covered Person for the treatment of such illness, sickness or bodily injury (the Loss)." JA 58. The Plan, however, at its option has

> the right to recover from the Covered Person any payment for benefits paid for treatment of such Loss under this Booklet which the Covered Person is entitled to receive from the third party.

JA 58. The Plan has "a first lien upon any recovery, whether by settlement, judgment or otherwise, that the Covered Person receives" from the responsible third party (or its insurer or guarantor or from uninsured motorist insurance). JA 58. That "lien will not exceed: the amount of benefits paid under [the] Booklet for the treatment of the Loss; or the amount received by the Covered Person for such medical treatment from the third party." JA 59. The Covered Person must "cooperate fully" with the Plan, and if a recovery is obtained from a third party and the Plan is not reimbursed "fully for any benefits paid under this provision," then the Covered Person "will be personally liable . . . to the extent of such recovery up to the amount of the first lien." JA 59.[1]

The essential dispute on the merits is over the scope of the reimbursement right under the plan. *See* JA 244. The position urged by respondent Janette Knudson—and adopted by both the state and federal trial courts considering it, but not discussed by the court of appeals—is that this recovery provision (like the coordination of benefits provision) targets only *duplication* of payments to the injured person and thus reaches only money paid by the third party (alleged tortfeasor) for the medical expenses covered by the plan, not money paid by the third party for other losses such as future

[1] The provisions quoted in the paragraph in text use "we" and "us" to describe both the payments made and the recovery rights, and the Summary Plan Description (at V-10) says: "'We', 'our' and 'us' will be used in reference to:—for Health Benefits, the Employer . . . ." Ex. 25 to Def. Cross-Motion for Summary Judgment. Consistent with the limited class of permitted plaintiffs under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) ("participant, beneficiary, or fiduciary"), petitioners, throughout their brief and elsewhere, treat "the Plan" as having made the payments and being entitled to the claimed recovery. *See, e.g.*, Pet. Br. 4, 6, 11, 12, 13, 15, 18, 23, 24, 28, 29, 34, 35; JA 77-78 (Right of Recovery Agreement); JA 85 (complaint); JA 90, 92 (amended complaint); JA 180 (Brown declaration). This brief accordingly refers to the Plan's asserted right to recover.

medical expenses or lost income or loss of enjoyment of life from a long-term disability. The provision begins by introducing its subject in terms of past expenditures, *i.e.*, "*expenses incurred*," for which a third party may be liable but that the Plan pays. It states that the Plan has "the right to recover from the Covered Person any payment *for benefits paid for treatment of such Loss under this Booklet* which the Covered Person is entitled to receive from the third party."[2] It states that the lien "will not exceed . . . the amount received by the Covered Person *for such medical treatment* from the third party," and it restricts the liability of the Covered Person to "the amount of [that] lien." JA 58-59 (emphases added).[3] *See U.S. Healthcare, Inc. v. O'Brien*, 868 F. Supp. 607, 610-11 (S.D.N.Y. 1994). Petitioners, in contrast, have urged that the provision reaches (up to the amount of benefits paid by the Plan) any payments made to the injured person by a third party on account of the injury, whether for Plan-paid medical expenses or otherwise, and without any Plan sharing of the costs of obtaining the settlement.[4]

[2] The possible confusion from the phrase "payment for benefits paid" may be alleviated by re-arranging the sentence: the Plan has "the right to recover from the Covered Person any payment" "which the Covered Person is entitled to receive from the third party" "for benefits paid for treatment of such Loss under this Booklet."

[3] The Right of Recovery Agreement signed by Eric Knudson, on which petitioners rely, introduces its topic as the possibility that a third party "may be liable for like benefits," *i.e.*, the Plan-paid benefits. The sentence in the Agreement about recovery seems to focus on payments for Plan-paid expenses: "the Plan may recover from me any payment for benefits paid under this Plan . . . which I or my dependents may be entitled to receive from a third party" ("for" omitted at ellipsis). JA 77-78.

[4] Chief Judge Posner, speaking for the Seventh Circuit, recently explained, in terms applicable to the present case, some of the consequences of such a demand: it "would allow the plan to free ride on the efforts of the plan participant's attorney"; it would "gratuitously deter the exercise of the tort rights of plan participants" who can easily (as here) "lose part of [their] plan benefits simply by virtue of having exercised

The third petitioner in this case (besides Earth Systems and the Plan) is Great-West Life & Annuity Insurance Company (Great-West), whose relation to the other two petitioners was defined by two agreements, entered into simultaneously in 1990. In a Services Agreement—separately signed by a "Plan Administrator" and Contractholder Earth Systems' Treasurer (JA 31)—Great-West undertook to provide "non-discretionary" benefit-payment services to the Plan (JA 25). The Agreement states that "under no circumstances shall Great-West be designated as plan administrator or a fiduciary of the Plan" and that it does not "confer upon Great-West any authority or control respecting management of the Plan[or] authority or responsibility in connection with administration of the Plan." JA 28; *see* JA 178 ("non-discretionary claims service administrator").

In a separate agreement, Great-West issued to Earth Systems ("the Contractholder") a group contract for stop-loss insurance, under which Great-West, in exchange for premiums, bore the risk that plan benefits would exceed certain designated amounts for which Earth Systems was itself responsible. JA 35-38[5]; *see* Pet. Br. 3

[their] right to bring a tort suit against a third party" (the reimbursement claim, arising only if there *is* a recovery, can be *more* than the net proceeds, leaving the participants worse off than if they never sue); that "prospect might well deter a suit likely to result in a judgment or settlement not much larger than the benefits available under the plan," producing "undercompensation for harms [other than medical expenses] that were unrelated to the type of harm [medical expenses] to which the benefits pertain"; and "[t]he plan itself might well be worse off in the long run, as it would have to incur attorneys' fees in order to enforce its right of subrogation." *Wal-Mart Stores, Inc. Associates' Health and Welfare Plan v. Wells*, 213 F.3d 398, 402 (7th Cir.) (Posner, C.J.), *cert. denied*, 121 S. Ct. 441 (2000).

[5] As of January 1, 1994, Earth Systems changed its plan from "self-funded" to insured—an important distinction for ERISA purposes. *See Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985). Before then, Earth Systems had responsibility for providing the needed funds for

("stop-loss insurance coverage . . . reimbursed the employer," not the Plan). While the stop-loss contract states that it created no "rights or obligations whatsoever on the part of Great-West with respect to the persons covered under the plan, or their beneficiaries" (JA 42), it provides that Earth Systems "assign[ed] to Great-West all of its rights to make, litigate, negotiate, settle, compromise, release or waive," in the "sole discretion" of Great-West, any claim "under the Right of Recovery Provision contained in the Plan." JA 45. Subsequent adjustments to the stop-loss contract (JA 46-49, 50-53) set forth the priority of distribution of money collected under the recovery provision (first to Great-West, then to Earth Systems), *see* JA 49, 52-53, and state: "The Contractholder hereby assigns to Great-West any and all rights the Contractholder, as Employer, may have under the Right of Recovery Provision contained in the Plan." JA 49, 53.

B. The Accident And Its Aftermath

On June 10, 1992, Janette Knudson and Eric Knudson (then Janette's husband), along with three passengers, were involved in an automobile accident that left Janette a quadriplegic from a severe injury to her spinal cord. JA 112, 145. As a result of her injuries, she incurred substantial medical expenses. At the time, Eric Knudson was an employee of petitioner Earth Systems, and both he and his wife were "Covered Persons" under the Summary Plan Description. The Plan eventually paid $411,157.11 in medical expenses, though petitioners have not alleged or established that any of that money was ever paid to Janette Knudson (or Eric), rather than the providers of her medical care. JA 238.

the Plan, and Earth Systems purchased insurance for itself, with the insurer having no direct relationship to the beneficiaries. Beginning in 1994, the Plan purchased insurance, with the beneficiaries then having a direct relationship, as insureds, to the insurer. JA 177 n.1, 208, 215.

In August 1992, two months after the accident, Great-West wrote a letter to Eric Knudson stating, among other things, that the Plan was entitled "to be a party to any legal action you may take because of an accident or injury" (JA 71) and "to full reimbursement for expenses" paid by the Plan (JA 71). In September 1992, Great-West wrote a letter to Janette Knudson (at the same address as Eric Knudson's) stating that Great-West "on behalf of the Plan has a first lien Right of Recovery to any sums paid in settlement or judgment on your behalf as a result of the accident" and asking for completion of the "Right of Recovery Agreement" (prepared by Great-West and included with the letter, *see* JA 68). JA 75-76. The next month, Eric Knudson signed and returned the agreement, evidently without authorization from Janette Knudson, as she attested (JA 113). The Agreement "request[ed] that benefits be paid by the Plan . . . with the understanding . . . that another party or insurer may be liable *for like benefits* for which they will make payments" (emphasis added) and then addressed subrogation (in one paragraph) and reimbursement (in another) (JA 77-78):

> In consideration for the plan paying benefits and in accordance with the terms of the Plan, I agree that the plan may be subrogated to me or my dependent's rights for any benefits from the other party. I agree to transfer to the Plan any right I or my dependents may have to take legal action against the other party. I also agree to cooperate fully with the Plan in asserting its right to subrogate and supply to the Plan any and all information. I will execute all documents reasonably necessary to carry out its right to recover from the other party any benefits paid under the Plan which are subject to this provision.
>
> I also understand that under the terms of the Plan, the Plan may recover from me any payment for benefits paid under this Plan for which I or my dependents may be

> entitled to receive from a third party. The Plan shall automatically have a first lien upon any recovery, whether by settlement, judgment or otherwise, that I or my dependents receives from another party, the other party's insurer or guarantor, or my own insurer or guarantor. Said first lien shall be for the amount of medical and hospital benefits paid by the Plan, I shall be personally liable to the Plan to the extent of such recovery up to the amount of its first lien. I agree to cooperate fully with the Plan in asserting its rights to recover.

C. The State Court Tort Action

In late 1993, Janette Knudson and Eric Knudson filed a tort suit in the California courts seeking to recover from Hyundai Motor Company, the manufacturer of the car, and others. JA 238. Great-West had notice of the ligitation from the outset (Pet. Br. 6-7), but it did nothing to participate or to assist financially in the litigation. After more than three years of discovery and vigorous disputes over the alleged defects in the automobile and the cause of Janette Knudson's injuries (JA 145-46), Janette Knudson and the defendants in March 1997 negotiated a settlement of the state-court case in the amount of $650,000, conditional on court approval. JA 161-66 (conditional release). (Eric Knudson does not appear on the relevant papers; in April 1997 he informed Great-West that he and Hyundai had settled his loss–of-consortium claim. C.A. Appellee ER at 261. *See* note 9, *infra*.)

Janette Knudson petitioned the state court for an order to approve the settlement and, as part of that settlement, to establish a Special Needs Trust under California Probate Code § 3611 to provide (if only for a limited time) for some of her special needs that will not be covered by state Medicaid ("Medi-Cal") or related programs. JA 145-60; *see* JA 115-38 (Trust). The petition was joined by Louise Curinga, "a long term friend" who had "agreed to be the

Trustee of the Janette Knudson's Special Needs Trust." JA 145. It recited, with supporting declarations, that future medical expenses alone would be more than $2.5 million and lost earnings more than $819,000, that Janette Knudson "will need lifetime care and lifetime attendant assistance," and that she would need special wheelchairs, beds, vehicles, house alterations, and other help. JA 148; *see* JA 142 (noting lost-earnings figure from Knudson's evidence). Pursuant to California Probate Code § 3602, notice was given to California authorities so that they might satisfy their liens (for Medi-Cal payments made) and ensure that the statutory qualifications for the Trust were met. JA 149-53.

The petition laid out the calculation of how much money was to be put into the Special Needs Trust—$256,745.30, representing the $650,000 settlement amount, minus the attorney's fees and other costs of obtaining the settlement (totaling $373,426),[6] minus the amounts to be paid to the two known lienholders, namely, Medi-Cal and Great-West. JA 153-58. A payment of $5,000 was reserved for Medi-Cal. JA 157. As for Great-West, the petition reported the dispute over the proper amount, noted that Great-West had never intervened or filed a lien notice in the state-court suit, and explained why, under the language of the plan, Great-West's claim (defined by the lien created by the Plan) was limited to "'the amount received . . . *for [the Plan-funded] medical treatment* from the third party.'" JA 154-55 (quoting plan) (emphasis added). Accordingly, the proposed Great-West

[6] Although petitioners report the total of $373,426 (Pet. Br. 7), they omit the breakdown: (a) recovery of costs (including expert fees) of $161,760 advanced by counsel over the years of the litigation, and (b) an attorney's fee of $216,666, representing a 1/3 share (reduced from the agreed-on 40% share). JA 157. Janette Knudson attested that, upon review (by herself and Trustee Louise Curinga) of the attorney's fee and costs, she did not object to those charges, considering "the testing, time, effort, and numerous experts employed . . . as consultants in order to attempt to prove the crash worthiness theory." JA 113.

payment was based on the allocation of the settlement amount to various categories of loss traceable to the accident: 45% for future medical expenses; 40% for loss of enjoyment of life, distress, and long-term disability; 5% for lost earnings; 5% for housing, transportation, and other needs; and 5% for past medical expenses. JA 154. With Great-West limited to recoveries for past medical expenses, the 5% figure was applied to the net settlement ($650,000 minus the fees and costs of $373,426, resulting in $276,574) to arrive at a $13,828.70 payment to Great-West. JA 157.[7]

On March 26, 1997, Janette Knudson gave notice of the proposed settlement to Great-West by mailing it the papers seeking state-court approval of the settlement. JA 233. On April 22, 1997, the day before the state-court hearing date, Great-West, calling itself a "defendant" and asserting that the state-court action involved federal claims relating to ERISA benefits, filed notices of removal of the case. JA 167-70; *see* JA 233 (date of filing). On June 30, 1997, the federal district court remanded the case to state court, concluding that Great-West, not being a defendant in the case, could not remove it. JA 171-75; *see* JA 233.

A few days later, a new notice of a new settlement-approval date in state court was sent to and received by Great-West and Earth Systems, Inc., which still did not intervene or otherwise participate in the state-court suit. JA 217, 233-34. In late July 1997, the state court approved the settlement, with $13,828.70 to go to Great-West, $2,729.42 to Medi-Cal (whose actual claim was lower than

[7] If the $411,157.11 sought here by Great-West were subtracted directly from the $650,000 settlement amount, $238,842.89 would remain. If Medi-Cal were then paid its $2,729.42, and the out-of-pocket expert fees and other costs advanced by counsel ($161,760) were paid, $74,353.47 would remain. Out of that amount would have to come (a) a recovery to Janette Knudson and (b) a fee to counsel who worked for years to obtain the settlement.

the reserved $5,000), $260,015.88 to the Special Needs Trust, and the remainder to Janette Knudson's counsel for his costs and fees. JA 139-44. The court found that Janette Knudson qualified for the Special Needs Trust, which would receive an amount "substantially less than the present value of the future medical expenses" (JA 140-141); that there was a substantial risk of Janette Knudson's not prevailing at all in the "disputed, highly complex product liability" action (JA 141); that the allocation of the settlement amount to various categories of loss was fair (given, particularly, the estimated $2.5 million in future medical expenses and $819,000 in lost earnings) (JA 143); that the plan provision invoked by Great-West is limited to the amount recovered for "past medical expenses" (JA 143); and that the attorney's fees and costs—in a case requiring "considerable discovery, vehicle testing, seat belt testing including the employment of eleven (11) expert witnesses"—were proper (JA 143-44). Hyundai was directed to pay the Trust amount directly to the Special Needs Trust and the remainder to a Client Trust Account held by Janette Knudson's attorney. JA 144. Janette Knudson herself received no money.

On August 1, 1997, the order approving the settlement was mailed to Great-West and Earth Systems, Inc. JA 234-35 (stipulation of parties). On August 21, 1997, notice was given to Great-West that a check of $13,828.70 was being sent. JA 235. Petitioners' attorney responded the next day that all funds should segregated pending the outcome of the federal-court case, but Janette Knudson's attorney replied, the same day, that he had already disbursed the money he had received and the money for the Special Needs Trust had been paid directly into that trust by third-party Hyundai. JA 235.

D. This Litigation

On May 19, 1997, before the federal court rejected the effort to remove the state-court case, Great-West (by itself) filed a complaint in federal district court against Janette and

Eric Knudson, asserting that it was "the assignee for collection" of the Plan for reimbursement purposes. JA 82; *see* JA 81-86. Great-West invoked ERISA § 502(a)(3)(B)(ii), 29 U.S.C. § 1132(a)(3)(B)(ii) ("appropriate equitable relief . . . to enforce . . . the terms of the plan"). *See* JA 82, 85. It asked for a declaration of rights and an injunction requiring the Knudsons "to reimburse the Plan in the amount of $411,157.11 out of any proceeds they recovered from third parties." JA 85-86.

In early July 1997, an amended complaint was filed (JA 87-95; *see* JA 5, 234), now with three plaintiffs (petitioners here)—Great-West, again asserting that it was "assignee for collection" of the Plan for purposes of reimbursement; the Plan itself; and Earth Systems, Inc., which stated that it was the Plan Administrator. JA 88-89. The amended complaint, now also reciting the Right of Recovery Agreement signed by Eric Knudson (JA 91-92), again asserted that the Knudsons violated the plan "[b]y not agreeing to reimburse the Plan [out of] the amount recovered" in the state-court tort suit (JA 92) and invoked ERISA § 502(a)(3) to recover (JA 92). Petitioners asked for an injunction requiring reimbursement of $411,157.11 to the Plan (JA 92), a declaratory judgment declaring the Plan's right to reimbursement in that amount (JA 93), a temporary restraining order and preliminary injunction against continuation of the state-court proceedings for approval of the settlement until the federal court determined petitioners' reimbursement rights and against any disposition of funds received in the settlement (JA 93-94), and a permanent injunction against any such disposition (JA 94). While the concluding prayer for relief requested "an injunctive order enjoining Defendants to reimburse the Plan . . . and for any other relief to which it is entitled" (JA 95), no mention was made of any remedies besides a preliminary or permanent injunction, declaratory judgment, and TRO.

The district court denied the application for a TRO to stop state-court completion of the settlemcnt proceedings. JA 96-99. It relied first on the Anti-Injunction Act's broad prohibition against federal courts enjoining state court proceedings (28 U.S.C. § 2283), concluding that none of the exceptions to the broad bar applied to justify "disrupt[ing] the delicate balance of federalism." JA 98. The court also found petitioners unlikely to succeed, noted that (at the time) "their rights of subrogation remain[ed] intact," and observed (relatedly) that "Great-West has filed this Application after failing for three years to intervene in the state court action." JA 99.

After the state court approved the settlement and the money was disbursed (as described above), and after Janette Knudson answered (JA 100-11), this litigation proceeded in discovery. Petitioners filed a motion for summary judgment in December 1997. Petitioners' position, stated by trustee Jerol Brown, was that the Plan's right of recovery provision, and the Right of Recovery Agreement signed by Eric Knudson, entitled the Plan to recover its $411,157 out of the full $650,000, without deduction for the costs of securing the settlement and without regard to whether Janette Knudson was being made whole for her losses. JA 180-82; *see* JA 185-86 (re-affirming interpretation after considering additional language).[8] Janette Knudson filed a motion for

[8] Petitioners, citing their own Ninth Circuit brief, report that Great-West offered (presumably to Janette Knudson, the alleged obligor) to accept only $200,000 if Janette Knudson's counsel would accept $200,000 as well, leaving $250,000 for the Special Needs Trust. Pet. Br. 7. The $200,000 amount for counsel would, after subtracting the more than $161,000 in out-of-pocket expert fees and other costs incurred by counsel, have left a fee of roughly $39,000. Petitioners do not suggest that such a fee would be reasonable or that they ever offered to pay Janette Knudson's counsel for his years of effort, bearing a substantial risk of no payment at all, that resulted in the settlement from which they sought to benefit.

summary judgment in mid-February 1998 contending that petitioners' recovery was limited to the $13,828.70 they had been offered all along. JA 8-15.[9]

In May 1998, the district court granted summary judgment against petitioners. The court wrote a brief opinion (JA 237-49) and adopted an edited version of Janette Knudson's statement of uncontroverted facts and conclusions of law (JA 210-35). *First*, the court concluded that the state court hearing the tort case had jurisdiction to "determine the status of liens on Janette Knudson's recovery" under ERISA § 502(a)(1)(B), which authorizes a beneficiary "to enforce his rights under the terms of the plan," 29 U.S.C. § 1132(a)(1)(B). *See* ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1) (concurrent jurisdiction over § 502(a)(1)(B) claims). JA 242-43; *see also* JA 228 ("failure after notice to subrogate or to enforce their alleged rights" in state court "preclude[s] them from re-litigating the same issues in this case"). *Second*, the court explained that petitioners' right of recovery must be governed only by the plan provision on the right of recovery, not by the Right of Recovery Agreement signed by Eric Knudson—which could not permissibly alter

[9] The petition for certiorari describes the judgments below as only in favor of respondent Janette Knudson, referring throughout to "respondent" and "Knudson" in the singular. Pet. i, 1-9. Eric Knudson did not appear in the court of appeals, was not served by petitioners in the court of appeals (according to the certificates of service attached to their notice of appeal and their briefs), and was not served and has not appeared in this Court. The relevant papers in the district court, including the "stipulation of facts between the parties" (JA 232), were filed only on behalf of Janette Knudson as defendant, not Eric Knudson (*see* JA 100 (answer); JA 210 (statement supporting summary judgment motion)), who seems to have filed only an opposition to the initial application for a temporary restraining order and an opposition to reconsideration of the summary judgment against petitioners (*see* JA 5-21). *See also* JA 139-60 (state-court settlement and accompanying release and court approval only on behalf of Janette Knudson). This brief hereafter refers simply to Janette Knudson as respondent.

the plan document without amendment. JA 245-46. *Third*, the court held that the plan terms are "abundantly clear" in limiting recovery to amounts "received from a third party *for medical treatment*" (JA 246-47 (emphasis added)); the court therefore rejected the interpretation of trustee Jerol Brown (who it said "was vested with the authority to interpret the Plan") as simply "clash[ing] with the terms of the Plan" (JA 246).[10] *See also* JA 228 (citing the Make Whole Rule presuming no reimbursement until injured person made whole, *see Barnes v. Indep. Automobile Dealers Ass'n of Cal. Health & Welf. Benefit Plan*, 64 F.3d 1389 (9th Cir. 1995)). *Finally*, the court held that the amount of the recovery for medical treatment expenses was resolved by the state court (JA 247), while separately declaring that the damages apportionment was fair (JA 228). *See also* JA 229 (adopting conclusion that stop-loss agreement unlawful). Accordingly, the court granted summary judgment against petitioners (and awarded attorney's fees, *see* Pet. App. D1-D6).[11]

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[10] Jerol Brown pointed (JA 185) to the Trust Agreement as vesting him with interpretive authority, but the Trust Agreement nowhere states a discretion to "interpret" or "construe" (JA 189-202), and Brown did not identify the particular language he was relying on. It is unclear, therefore, how the pertinent language fares under the standards for overcoming the presumption of *de novo* review. *See, e.g., Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989); *Ingram v. Martin Marietta Plan*, 244 F.3d 1109 (9th Cir. 2001); *Feder v. Paul Revere Life Ins. Co.*, 228 F.3d 518 (4th Cir. 2000); *Postma v. Paul Revere Life Ins. Co.*, 223 F.3d 533 (7th Cir. 2000); *Herzberger v. Standard Ins. Co.*, 205 F.3d 327 (7th Cir. 2000) (Posner, J.).

[11] Among the motions the district court denied was petitioners' motion (filed in December 1997, *see* JA 8) to amend the complaint to add as defendants both Janette Knudson's counsel and Louise Curinga, trustee of the Special Needs Trust. *See* JA 249; Pet. Br. 8. Neither on appeal, nor in their petition for certiorari, did petitioners make any argument that, even if summary judgment was proper as to Janette (and Eric) Knudson, it was error to deny leave to amend. *See* JA 252 n.4 (court of appeals noting lack of challenge); C.A. Brief of Appellants 6-7 (statement of issues), 16-31 (availability of § 502(a)(3)), 31-41 (no preclusion by state-court judgment), 41-53 (interpretation of plan terms), 53-58 (enforceability against Janette Knudson of separate agreement signed by Eric Knudson), 58 (remand to determine amount of medical expense recovery), 58-59 (attorney's fees).

E. Court of Appeals Decision

On appeal, the Ninth Circuit affirmed the judgment against petitioners, but on a threshold ground (whether or not deemed jurisdictional). JA 250-53. The Ninth Circuit had held in *FMC Medical Plan v. Owens*, 122 F.3d 1258 (9th Cir. 1997), and reaffirmed in *Cement Masons Health and Welfare Trust Fund for Northern California v. Stone*, 197 F.3d 1003 (9th Cir. 1999), and *Reynolds Metals Co. v. Ellis*, 202 F.3d 1246 (9th Cir. 2000), that "actions by ERISA fiduciaries seeking to enforce an ERISA plan's contractual reimbursement provisions," where the initial benefits (or, for that matter, the recovery from the third-party alleged tortfeasor) were not wrongfully obtained in the first place, do not come within ERISA § 502(a)(3)'s authorization for "equitable relief." *Reynolds Metals*, 202 F.3d at 1248-49; *see FMC Medical*, 122 F.3d at 1262 ("substance of the remedy sought by FMC is money damages for Owens's alleged breach of the Plans"); *Cement Masons*, 197 F.3d at 1007-08. The Ninth Circuit in the present case concluded that those decisions controlled and thus affirmed the judgment against petitioners—for either lack of a cause of action (as *Cement Masons* said) or for lack of jurisdiction (JA 253 n.5).

SUMMARY OF ARGUMENT

The Ninth Circuit's judgment affirming the dismissal of petitioners' suit is correct for two reasons. The suit does not seek "equitable relief" under the standard set by this Court in *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993). And even if it does, the suit does not seek "appropriate" equitable relief.

To state a cause of action for "equitable relief" under Section 502(a)(3), a claim must, under *Mertens*, seek relief that was traditionally available in equity, for litigants generally, for the type of claim made. A reimbursement claim like petitioners' claim, however, seeks nothing but money due under an obligation to pay. It does not involve specific plan property or its product: the recovery amount claimed is not money that was actually obtained from the plan or the proceeds or profits of such money, let alone money obtained by anyone's wrong or error. Such a money claim was not typically remediable in equity, but had to be pursued at law, even when the substantive basis alleged was unjust enrichment. It is immaterial whether restitution in equity might be available when non-monetary property is involved or when, as in *Harris Trust and Savings Bank v. Salomon Smith Barney Inc.*, 120 S. Ct. 2180 (2000), a claim is for money transferred out of a trust by the trustee's wrongful conduct (though without wrong by the recipient). Nothing shown by petitioners or the United States establishes, that equity typically provided a remedy for a money claim like petitioners', which does not seek return of specific Plan assets (or their profits or proceeds), let alone Plan assets improperly transferred. Indeed, petitioners' claim is deficient for an additional reason: the recovery amount was never received by respondent, making the claim against her one for purely personal monetary liability, and thus outside the equitable restitution remedies of constructive trust and equitable lien.

This conclusion is not overcome by the pleading device of requesting an "injunction" to pay the money claimed. Likewise, blanket invocation of "restitution" (or its "unjust enrichment" basis), which was available in *different* circumstances in the equity and law courts, fails to distinguish whether the *equitable* restitution remedies were traditionally available for the type of claim presented. The law of trusts does not help petitioners either: *Mertens* pointedly rejected a trust-specific application of Section 502(a)(3); and in any

event, a trustee's suit against a beneficiary for money was an action at law if such claims, aside from trust law, were actions at law. Finally, the claim cannot become equitable simply because damages might be unavailable: allowing an injunction to pay money to substitute for damages would simply reverse the congressional rejection of such remedies, as established by *Mertens*' definitive construction of Section 502(a)(3). The potential lack of remedy for plans cannot support a different result: *Mertens* made clear the standard, despite the obvious potential that some wrongs and harms would go unredressed without damages remedies; and, given the breadth of ERISA preemption, leaving wrongs unredressed is far from alien to ERISA. Accordingly, Section 502(a)(3)—which petitioners cannot properly supplement with newly created nonstatutory remedies—does not embrace petitioners' claim.

If this Court nevertheless were to conclude that petitioners' claim seeks "equitable relief," the claim still should be held outside Section 502(a)(3) on the ground that it does not seek "appropriate" relief. The Court's decision in *Varity Corp. v. Howe*, 516 U.S. 489, 515 (1996), makes clear that the appropriateness of the relief is an additional requirement for coverage by Section 502(a)(3). A claim should be held not appropriate under the provision if it would harm ERISA interests—*e.g.*, by increasing litigation expenses and interfering with tort suits for recovery—and generate substantial difficulties of coordination and comity between state and federal courts, and if there are alternative avenues for protecting legitimate ERISA interests that avoid those harms. Reimbursement claims like petitioners' are not appropriate for those reasons.

Such reimbursement claims intrinsically generate duplicative litigation, as they add to the (typically) state-court tort suit a new federal proceeding with interrelated issues. The costs and delays of such duplicative litigation must be

borne by beneficiaries and participants and by plans, too, and can impede the completion of the state-court proceedings that produce the very recovery sought by the plans. The plan itself (or its representatives) may even be party to the state-court tort suit under a subrogation provision, which leaves the tort claim to which the plan would be subrogated as a state-law claim in state court. Permitting such fractured and multiple litigation makes no sense, in terms of ERISA interests or the interests of the state and federal judiciaries, where it is not shown to be unavoidable.

Petitioners have not shown that plans cannot protect their interests in enforcing recovery rights through participation in the underlying state-court suit, as by intervening to assert a lien on the recovery amount or to assert rights as subrogee. The sole suggested impediment is that of preemption, but petitioners have not shown that these state-court mechanisms should be preempted. In fact, such mechanisms do not add any obligations to override plan choices about benefits payments or administration, and they do not add any liabilities to those authorized by ERISA: they provide procedural mechanisms for a plan to obtain, under federal-law principles governing application of plan terms, exactly what it claims an entitlement to receive under its own chosen recovery provisions. The sensible course of participation in the underlying state-court case thus has not been shown to be preempted. The duplicative federal-court suits petitioners propose should accordingly be held to be not "appropriate," and thus outside the scope of Section 502(a)(3).

ARGUMENT

I. PETITIONERS' MONEY CLAIM DOES NOT SEEK EQUITABLE RELIEF UNDER SECTION 502(a)(3)

Section 502(a)(3) requires that the relief sought be "equitable relief." Petitioners' suit, however, seeks nothing

more than money to fulfill an obligation to pay. In particular, it does not seek the return of specific property (or even money) once properly conveyed to respondent or the proceeds from any such specific property; indeed, it does not claim money actually ever acquired by respondent. Such a claim traditionally was not typically remediable in equity and is thus outside Section 502(a)(3).

A. Section 502(a)(3) Covers Only Claims Typically Remediable In Equity

In *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), this Court established the meaning of "equitable relief" under ERISA § 502(a)(3). The case involved a claim under Section 502(a)(3) by beneficiaries of an ERISA-covered plan against a nonfiduciary who knowingly participated in a breach of fiduciary duty, causing underfunding of a pension plan that consequently was terminated. 508 U.S. at 250-51. The Court held that the suit was not within Section 502(a)(3) because the beneficiaries sought compensatory damages, not "a remedy traditionally viewed as 'equitable.'" 508 U.S. at 255.

The Court rejected the position that "equitable relief" under Section 502(a)(3) embraced "'whatever relief a court of equity is empowered to provide in the particular case at issue,'" even while acknowledging that "equitable relief" in isolation could bear that meaning. 508 U.S. at 256. Rather, the Court squarely construed "equitable relief" to refer only to "those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." *Id.* (emphasis in original). The Court made clear, moreover, that the standard is not what was ever available from equity courts, not even what was usually or always available under an entire branch of equity jurisprudence (trust law), but what types of relief were "typically" available in equity generally. Over a dissent on this precise point, the Court held that it was not enough that the relief sought was available from equity courts in a whole

category of cases that included the case before it, *i.e.*, suits against trustees or those who knowingly participate with trustees in breaches of trust. *Id.* at 255-56; *id.* at 258 ("'equitable relief" does not mean "'all relief available for breach of trust at common law'").

In its subsequent decisions under Section 502(a)(3), this Court has not altered the *Mertens* standard for "equitable relief." In particular, the Court did not alter the standard in *Varity Corp. v. Howe*, 516 U.S. 489 (1996), which held that beneficiaries could sue under Section 502(a)(3) to obtain individual relief (there, simple reinstatement in a benefits plan), not just relief on behalf of the plan.[12] Nor did the Court alter the *Mertens* standard in *Harris Trust and Savings Bank v. Salomon Smith Barney Inc.*, 120 S. Ct. 2180 (2000), which held that a nonfiduciary who received plan money from a trustee's prohibited transaction could be sued for its return, as restitution, under Section 502(a)(3). As petitioners thus acknowledge, Section 502(a)(3), under the controlling *Mertens* interpretation, is limited to "those remedies traditionally thought of as equitable relief and typically available in equity." Pet. Br. 11; *id.* at 17.

B. A Claim For Money To Fulfill An Obligation To Pay, Not For Return Of Specific Property (Or Its Product), Was Not Typically Remediable In Equity

1. *Petitioners' Claim.*

It is important, at the outset, to recognize that petitioners' claim is not a claim for return of particular money that the Plan paid to respondent and that respondent still retains. First, petitioners have not established that Plan money was

[12] The Court had earlier rejected a claim for individual relief under Section 503(a)(2). *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985).

ever paid to respondent, rather than to providers of her medical services. *Compare* JA 75 (Great-West letter stating that money "has been paid *to hospital and medical providers on your behalf*") (emphasis added). Second, the money the Plan paid for medical expenses was spent. What petitioners are seeking, therefore, is not *that* money (or profits from its use or proceeds from its exchange); it is new money paid out by a third party, the alleged tortfeasor—money that petitioners might have sought directly had they sued as subrogees. This fact is common to reimbursement claims generally. Third, and more particular to this case, respondent did not in fact ever receive any money in the tort suit: the money went to the Special Needs Trust, to Medi-Cal, and to respondent's counsel (and thereafter to his creditors).

Given those facts, the basis for the claim here is simply the "obligation to pay money to a plan under a reimbursement provision of the plan" (Pet. Br. 12); petitioners seek "to enforce [the plan's] terms" by "compelling the performance of a monetary obligation" (*id.* at 10). *See id.* at 14-15.[13] This obligation is in sum and substance a contract obligation. *Id.* at 10 ("a contractual promise"), 14-15 ("specific performance"); US Br. 18 ("agreement"). Although the United States says that an ERISA Plan, like other trusts, is not "*merely* one type of contract," not "a *garden-variety, arm's-length* contract" (US Br. 16 (emphasis added)), it remains true that "[a]n ERISA plan is a contract." *Herzberger v. Standard Ins.*

[13] Although the United States briefly invokes "double recovery" (US Br. 14), it does not explain what it means. Respondent has always tendered to petitioners the part of the settlement paid for the medical expenses that the Plan had previously paid on her behalf; and given the small recovery compared to the magnitude of respondent's lifetime losses wholly apart from the Plan-paid past medical expenses, the remaining settlement amount in no reasonable sense represents a "double recovery" for Plan-paid medical expenses. Accordingly, if there is "unjust enrichment" here, it is solely because of a plan-defined obligation to pay, not for any other reason.

Co., 205 F.3d 327, 330 (7th Cir. 2000) (Posner, C.J.); *see Tester v. Reliance Standard Life Ins. Co.*, 228 F.3d 372, 375 (4th Cir. 2000); *Wal-Mart Stores, Inc. Associates' Health and Welfare Plan v. Wells*, 213 F.3d 398, 402 (7th Cir.) (Posner, C.J.) (citing Langbein, *The Contractarian Basis of the Law of Trusts*, 105 Yale L.J. 625 (1995), *cert. denied*, 121 S. Ct. 441 (2000). By the act of accepting the benefits, a beneficiary generally becomes contractually bound to the clear terms on which they were offered. *See* Restatement (Second) of Contracts §§ 56, 59 (1981). It is that obligation which forms the entire basis for the claim to money here.

2. *Reimbursement Claims Generally.*

a. Equity did not generally provide relief for claims for money owed, where plaintiffs were not seeking funds identified as property conveyed in breach of a fiduciary duty (by someone) or its proceeds. Thus, as the United States acknowledges—based on *Raton Waterworks Co. v. Raton*, 174 U.S. 360 (1899), and the Restatement (Second) of Contracts § 359 (no specific performance if "damages would be adequate to protect the expectation interest of the injured party")—specific performance of a contract to pay money was *not* typically available in equity. US Br. 26; *see* Restatement (Second) of Contracts § 373(2) (restitution, even as damages relief, is not available to enforce a contractual obligation to pay a definite sum of money). In other contexts, too, it is well established that claims for money owed traditionally must be pursued at law, not in equity. *See, e.g., United States v. Bank of Metropolis*, 40 U.S. (15 Pet.) 377, 379 (1841); *Gaines v. Miller*, 111 U.S. 395, 397 (1884) (equitable relief denied, explaining: "Whenever one person has in his hands money equitably belonging to another, that other person may recover it by *assumpsit* for money had and received.") (cited in *United States v. California*, 507 U.S. 746, 755 (1993)); *Langenkamp v. Culp*, 498 U.S. 42 (1990) (following *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33,

58-59 (1989); bankruptcy trustee challenging transfer of money made pre-bankruptcy, when the transfer may well have been lawful, must bring a legal action against nonclaimant); *Austin v. Shalala*, 994 F.2d 1170, 1175-77 (5th Cir. 1993) (claims by the United States to recoup mistaken overpayments of benefits are *legal* claims, *i.e.*, claims in quasi-contract traditionally falling "under the common law writ of general assumpsit"); *United States v. Anderson*, 584 F.2d 369 (10th Cir. 1978) (government suits for taxes due are legal, relying on *Damsky v. Zavatt*, 289 F.2d 46 (2d Cir. 1961) (Friendly, J.)).

That traditional limitation did not evaporate when a plaintiff claimed that failure to pay money would result in "unjust enrichment": such claims for money, where not seeking the return of specific property (or its proceeds or profits), were also generally *not* remediable in equity, as the Restatement of Restitution (1937) makes clear. *See Hudson View II Associates v. Gooden* 222 A.D.2d 163, 168, 644 N.Y.S.2d 512, 516 (1st Dept. 1996) (claim for value of services performed and expenditures made for defendant, unlike claim for return of specific property, even when brought under "quasi-contractual theory of quantum meruit," had to be brought as action at law, citing Restatement of Restitution), relied on in *Wal-Mart*, 213 F.3d at 401; Restatement of Restitution, General Scope Note at 1 ("the subject of quasi contracts is limited to actions at law to secure the payment of money"). Thus, after defining restitution as the prevention of unjust enrichment (Restatement § 1, at 12), the Restatement (§ 4, at 17-18) identifies the different legal and equitable remedies available to prevent unjust enrichment in different circumstances and observes that "ordinarily [a] money judgment [against the recipient of the benefit] is obtained by an action at law," though "a decree for money will *sometimes* be rendered by a court of equity," referring to Sections 160-162 (on constructive trusts, equitable liens, and subrogation) for the specifics. § 4, Comment *e* at 21

(emphasis added). Section 160, Comment *a* (at 642), explains that a request for a constructive trust "seeks to recover specific property" whereas a quasi-contract action at law "impos[es] a merely personal liability." Comment *e* (at 645) then explains: "where money is paid by one person to another as a result of a mistake of such a character that the payor is entitled to restitution, he is *ordinarily not entitled to maintain a suit in equity* for the specific recovery of the money, even though the payee still holds the money so that specific restitution would be *possible* . . . ." (emphasis added). Only certain circumstances involving specific money still held by the defendant—if the defendant was insolvent or obtained the money "by an abuse of a fiduciary or confidential relation"—entitled the plaintiff to relief in equity for non-unique money. *Id.*; *see also* Restatement of Restitution § 161, at 650-53 (equitable lien).

The general unavailability of equitable remedies for restitution of *money* reflects the limitation of those remedies to obtaining particular property claimed by (and taken from) the plaintiff, in contrast to establishing personal liability. D. Dobbs, *Remedies* § 4.1 at 223 (1973) ("kinds of claims enforced in equity under the name of constructive trust" involve awards that are "restitutionary or restorative in the sense that the money gained by the defendant is identified with the property taken from the plaintiff" (footnote omitted)); Restatement of Restitution § 160, Comment *e* at 645 ("specific recovery"; "specific restitution"). Thus, Section 215 of the Restatement of Restitution (at 866) points to the "necessity of tracing property" in order to assert the equitable remedies, rather than have "merely a personal claim." *See id.* Comment *a* at 867 ("if it is shown that the property or its proceeds have been dissipated so that no product remains, [plaintiff's] claim is only that of a general creditor"); *see also* Restatement (Second) of Trusts § 202 (vol. 1 at 444) (1959) ("Following Trust Property into Its Product") (where trustee acquires property by wrongful

disposition of trust assets, the acquired property may be subjected to a constructive trust or equitable lien only if it is "the product of the trust property" and "can be traced"); Dobbs (1973), § 4.3 at 242 (stating tracing requirement); *id.* § 5.16 at 423-30 (application to money). Money not specifically traceable to wrongly received funds was generally outside the reach of the constructive trust remedy. *See St. Louis & S.F.R. Co. v. Spiller*, 274 U.S. 304, 310 (1927) (money nowhere segregated is not the traced product within constructive-trust law).

This focus on claims to specific assets (or their product) is reflected in the two references to "restitution" in *Mertens* that are something other than an abstract mention of the term. *See* 508 U.S. at 252 ("'profits of such fiduciary which have been made through use of assets of the plan by the fiduciary'"); *id.* at 260 ("restitution of ill-gotten plan assets or profits").[14] Similarly, the Court's decision in *Harris Trust*, relied on by petitioners (Pet. Br. 10-11, 20, 25-27) and the Government (US Br. 11-12, 29), not only said nothing to alter the *Mertens* standard but involved a claim within the property-specific equitable remedies traditionally available in equity for restitution. It involved an acquisition of trust money that *was* wrongful—because the trustee paid plan money to the defendant in violation of ERISA § 406(a), 29 U.S.C. § 1106(a)—and the suit sought return of just those "ill-gotten trust assets." 120 S. Ct. at 2190. *See* Restatement of Restitution § 160, Comment *e* at 645 (money obtained "by an abuse of a fiduciary or confidential relation").

By contrast, a reimbursement claim on behalf of an ERISA plan does not involve unique currency or money obtained as a

[14] The reference to "constructive trust" in the legislative history has the same focus. Sen. Rep. 93-383 at 105 (1973) ("a constructive trust may be imposed on the plan assets, if needed to protect participants and beneficiaries").

result of a breach of duty by a plan fiduciary or someone acting in concert with a plan fiduciary. A plan beneficiary "is not a fiduciary." *Health Cost Controls of Illinois, Inc. v. Washington*, 187 F.3d 704, 710 (7th Cir. 1999). And the money sought (*i.e.*, money coming from a third party) is not money obtained from the plan, or profits from it, or proceeds from exchanging it, let alone money obtained by anyone's breach of duty. The claim is not to specific property within the limited class of traditional equitable remedies for restitution.

This conclusion is not overcome by the argument that equitable remedies might allow for recovery of *some* property when there was nothing improper (on anyone's part) about the initial transfer of the assets to the defendant. Pet. Br. 25; *id.* at 25-28. Neither petitioners nor the United States have shown, contrary to the Restatement of Restitution, that such remedies were typically available when *money* was sought in such circumstances.[15] By the same token, it simply sidesteps the question to argue, as the United States does (US Br. 11, 27-29) that the *defendant* need not have engaged in wrongdoing to be subject to equitable remedies for

[15] Even some of the general relied-on statements about "property" seem to involve erroneous transfers. Thus, the statement at 5 A. Scott & W. Fratcher, *Law of Trusts* § 462.2 (4th ed. 1989), quoted at Pet. Br. 26, is cited by the United States for situations "where the assets were transferred by mistake" (US Br. 28); indeed, the next sentence says, "Thus a constructive trust arises where the title to property is acquired through a mistake, or where property is transferred by a trustee or other fiduciary, in violation of his duty as fiduciary, to a person who has no notice of the violation of duty but who pays no value." 5 Scott Treatise § 462.2 at 314-17. Another treatise quoted by the Government (at 27)—G. Bogert & G. Bogert, *Law of Trusts and Trustees* § 471 (rev. 2d ed. 1978), which in fact stresses the need for "specific property as the res of the trust" (*id.* at 9)—states that the following sections lay out "the principal types of wrongful retention of property which have moved chancery to decree the constructive trust" (*id.* at 29), but neither the United States nor petitioners have identified the present situation among those types.

restitution, even where money was at issue, a point established in *Harris Trust* and not in dispute. What has not been shown is the typical availability of equitable remedies to claim money when the claimed money had not been transferred from the plaintiff (or was the proceeds or profits of such money), let alone transferred by a wrong of *someone*, such as the transferor.[16] Indeed, in what the United States treats as supplying the most pertinent analogy, the Restatement (Second) of Trusts § 283 by its terms states that trust property, if transferred without breach of fiduciary duty, becomes the recipient's "free of the trust."

b. That petitioners' money claim fails under the *Mertens* standard is further supported by the (several) opinions in *Bowen v. Massachusetts*, 487 U.S. 879 (1988), and *Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255 (1999). *See* Pet. Br. 11, 19-20 (discussing *Bowen*); US Br. 19-20 (discussing *Bowen* and *Blue Fox*). *Bowen* allowed a suit under 5 U.S.C. § 702 to reverse an administrative determination denying money claimed by a State under the Medicaid statutes.[17] As *Blue Fox* explained, however, *Bowen*

[16] The United States notes that *Harris Trust* involved an unlawful transfer. US Br. 29 ("property transferred to [the defendant] in breach of a trustee's fiduciary duty"). The quotation in *Harris* of a 19th Century case and treatise by its terms refers generically to "property" and how it was "obtained," "'acquired.'" *See* Pet. Br. 27. Petitioners themselves characterize *Counihan v. United States*, 194 F.3d 357, 361-62 (2d Cir. 1999), as stating a principle for situations where "the *transfer* was in violation of the trust's terms" (Pet. Br. 26 (emphasis added)), and the case was one involving proceeds of an asset that had wrongfully (by arson) been transferred out of the claimant's possession. The Government (US Br. 29) relies on a statement in the Restatment of Restitution § 160 Comment *d*, at 643, that addresses "the result" of imposing a constructive trust, not the standards for imposing one.

[17] The Court stressed that the Medicaid statute was "a complex scheme . . . that governs a set of intricate, ongoing relationships between the States and the Federal Government," in contrast to "statutes that provide compensation for specific instances of past injuries or labors" (487 U.S. at

"did not turn on distinctions between 'equitable' actions and other actions," but, rather, on "what Congress meant by 'other than money damages'" in 5 U.S.C. § 702. 525 U.S. at 261; *see id.* at 262 (*Bowen* did not hinge on distinction "between equitable and nonequitable categories of remedies"). As a result, the majority in *Bowen* did not have to rule, and did not rule, that monetary relief was typically or traditionally available in equity. Supporting its reading of 5 U.S.C. § 702, the Court noted only that such relief "'occasionally'" was available in equity as something other than monetary damages (the classic form of legal relief). 487 U.S. at 895 (quoted at Pet. Br. 19); *see* US Br. 19-20 (*Bowen* and *Blue Fox* recognize that "*some* actions for monetary relief" are suits for equitable relief) (emphasis added).

The majority in *Bowen* thus did not disagree with the analysis in Justice Scalia's dissent (joined by the Chief Justice and Justice Kennedy) unmistakably showing that claims to monetary relief, by whatever form, were typically *not* equitable. Justice Scalia explained that the Court of Claims, though unable to give "equitable relief" (as the majority acknowledged, 487 U.S. at 905), has long heard claims against the United States for money past due (*id.* at 914, 919-21). He explained that it was only "rare suits for a sum of money" that could be brought in equity, those involving not payment for "a past loss" but orders "to prevent future losses" in certain cases. *Id.* at 918. He further explained that invoking "restitution" did not provide for relief

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900 n.31; *see id.* at 905), and, perhaps critically, that the Medicaid statute "directs the Secretary to pay money to the State, *not as compensation for a past wrong*, but to subsidize future state expenditures," again distinguishing laws that "compensate a particular class of persons for past injuries or losses" (*id.* at 905 n.42 (emphasis added); *see id.* at 883-84 (payments "actually a series of huge quarterly advance payments that are based on the State's estimate of its anticipated future expenditures" (footnote omitted)). *See Brighton Village Associates v. United States*, 52 F.3d 1056, 1059 n.3 (Fed. Cir. 1995).

in equity, for "'restitution' in the judicial context *commonly* consists of money damages," as indicated by the fact that the Court of Claims, broadly lacking equitable power, hears such claims. *Id.* at 917 n.2 (emphasis added). And he explained that merely using the form of "injunction" did not allow a suit in equity: "Almost invariably, . . . suits seeking (*whether by judgment, injunction, or declaration*) to compel the defendant to pay a sum of money [other than specific currency or coins] to the plaintiff are suits for 'money damages,' as that phrase has traditionally been applied" to distinguish general legal relief from general equitable relief. *Id.* at 918-19 (emphasis added; footnote omitted); *see id.* at 915-16 (quoted below). This analysis—not disputed by the *Bowen* majority, but found insufficient to answer the *different* question presented under 5 U.S.C. § 702—confirms that monetary claims like petitioners' were not typically and traditionally remediable in equity, as required by the *Mertens* standard.

Blue Fox lends further support to this conclusion. The Court there held, in agreement with the United States, that the determination whether a claim is for "substitute" or "specific" relief, the standard under 5 U.S.C. § 702, is (as Justice Scalia explained with respect to "restitution" and "injunction" in *Bowen*) not controlled by the form of relief claimed. 525 U.S. at 262-63. Thus, although the plaintiff sought an equitable lien, the Court looked through the label placed on the remedy to the substance of the claim itself, explaining that such an equitable lien is merely a device "to satisfy a money claim, usually a claim for unjust enrichment," and therefore "constitutes a claim for 'money damages.'" *Id.* (internal quotation marks omitted).

3. *This Case.*

Even if (contrary to the foregoing) some plan claims for reimbursement out of recoveries obtained by beneficiaries would be within the available "equitable relief" for restitution, petitioners' claim would not be. The constructive

trust and equitable lien remedies require that the property in which the plaintiff seeks a property interest (in whole or in part) be property to which the defendant can, if relief is granted, transfer title (or in which she can convey a partial ownership interest through a lien). Restatement of Restitution § 160, at 640 (defendant must be "person holding title to property"); *id.* Comment *j* at 649 ("Where a person does not acquire title to property but merely obtains possession of the subject matter, he is not chargeable as constructive trustee."); *id.* § 161 (equitable lien fastens on "property of" the defendant); 5 A. Scott & W. Fratcher, *Law of Trusts* § 462, at 304 (4th ed. 1989).[18] Respondent, however, did not receive any of the money paid out in the tort suit. Petitioners bypassed the state-court proceeding that distributed the money, and their complaints do not seek a "constructive trust" or an "equitable lien" (the Plan already has an express lien, *see* Pet. Br. 24 n.10; US Br. 25) for identified property of respondent.

C. The Arguments Presented To Support Section 502(a)(3) Coverage Are Flawed

1. *Injunction*.

Petitioners' primary argument is that it is sufficient that they have requested an injunction ("specific performance," Pet. Br. 20; US Br. 15) in order to make their claim one for "equitable relief" under Section § 502(a)(3). Pet. Br. 12-15.[19] *Mertens*, of course, mentions injunctions ("injunction, mandamus, and restitution") as a common form of equitable

[18] The United States notes that constructive trust and equitable lien are similar remedies, "the difference being that the equitable lien provides a security interest in, rather than complete title to, the property to which it attaches." US Br. 24-25 (citing authorities).

[19] Neither in this Court nor in the court of appeals have petitioners relied on the declaratory judgment request in the amended complaint. Pet. Br. 13-14. Nor does the United States.

relief. But the form of relief cannot possibly control. If merely seeking an "injunction" were enough to come within Section 502(a)(3), then the plaintiffs in *Mertens* could have re-framed their demand as one for an injunction requiring the respondent there to pay the money claimed, thus emptying of all meaning the important limitation on the reach of Section 502(a)(3) adopted by the Court. *See Bowen*, 487 U.S. at 919 (Scalia, J., dissenting) (quoted above); *id.* at 915-16 ("the line between damages and specific relief must surely be drawn on the basis of the substance of the claim, and not its mere form"; "[i]t does not take much lawyerly inventiveness to convert a claim for payment of a past due sum (damages) into a prayer for an injunction against refusing to pay the sum"); *Wal-Mart*, 213 F.3d at 401 (Posner, C.J.) ("[A] plaintiff cannot convert a claim of damages for breach of contract into an equitable claim by the facile trick of asking that the defendant be enjoined from refusing to honor its obligation to pay the plaintiff what the plaintiff is owed under the contract and appending to that request a request for payment of the amount owed. A claim for money due and owing under a contract is 'quintessentially an action at law.'"). What must be critical is whether an injunction was typically available for the kind of claim asserted, as it was not for petitioners' money claim.

2. *Restitution*.

The United States makes a general argument that any action seeking money due under a reimbursement provision is equitable "because it seeks to prevent unjust enrichment." US Br. 14; *id.* at 14-19. This argument suffers from a flaw similar to that infecting petitioners' "injunction" argument. There is no more reason to think that *Mertens* used "restitution" to authorize all restitution, regardless of whether it was typically available in equity for a type of claim, than that it used "injunction" (parallel in the phrase "injunction, mandamus, and restitution") to bring any request for an

injunction under Section 502(a)(3), even one that simply re-pleads a damages claim to request an order for a monetary payment.

The Government's argument incorrectly assumes that all actions alleging unjust enrichment, and for that reason demanding restitution, are equitable. The law is clearly to the contrary. As Chief Judge Posner noted in one of the decisions on which petitioners rely, *Health Cost Controls v. Washington*, 187 F.3d at 710 (relied on at Pet. Br. 24), it is simply "not true" that "restitution is an equitable remedy"; "[t]here really isn't any question about" the fact that "restitution is a legal remedy when sought in a case at law and an equitable remedy when sought in a case in equity." *See also Reich v. Continental Cas. Co.*, 33 F.3d 754, 755-56 (7th Cir. 1994) (Posner, C.J.), cited in US Br. 22 n.15; 1 D. Dobbs, *Remedies* § 4.1(3), at 564 (2d ed. 1993); *Bowen*, 487 U.S. at 917 n.2 (Scalia, J., dissenting) ("'restitution' in the judicial context commonly consists of money damages"). The broad allegation of "restitution," based on "unjust enrichment," is accordingly no help whatever in deciding whether a particular case is legal or equitable.

The fact is that *all* claims for restitution, whether legal or equitable, rest on the notion of restoring the status quo by removing the defendant's gain to correct "unjust enrichment." This concept was the common thread by which the Restatement of Restitution attempted to create a unified field out of its two major subheadings: quasi-contract, a legal action (originally assumpsit); and constructive trust, an equitable remedy. *See* Restatement of Restitution, General Scope Note at 1; Dobbs (1973), § 4.2 at 234-35; *id.* § 4.3 at 241-48; Dobbs (1993), § 4.1(1) at 552 ("unifying thread" of restitution is "to prevent the defendant's unjust enrichment by recapturing the gains the defendant secured in a transaction"); Laycock, *The Scope and Significance of Restitution*, 67 Tex. L. Rev. 1277 (1989). As a result, reliance on "restitution," or

"unjust enrichment" (its basis), cannot demonstrate that this case is within the limited class of restitution claims remediable in equity. What must be critical is whether the particular kind of claim for restitution was one "typically" remediable in equity, as petitioners' claim was not.[20]

3. *Trust Law.*

The United States, recognizing that equitable relief was *not* typically available to enforce an obligation to pay money under a contract (US Br. 26), attempts to escape the force of the general unavailability of the monetary relief sought here by focusing on the special part of equity that governed trusts (genuine trusts, rather than constructive trusts). US Br. 15-19.[21] The Government properly does not assert that respondent is an actual trustee with fiduciary responsibilities. Instead, the Government says that respondent is a beneficiary of a trust and that this suit is analogous to two permissible

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[20] Petitioners rely (Pet. Br. 21-23) on *Blue Cross & Blue Shield of Alabama v. Sanders*, 138 F.3d 1347, 1352-54 (11th Cir. 1998), and *Administrative Committee v. Gauf*, 188 F.3d 767, 770-71 (7th Cir. 1999). But *Sanders* declined to rule whether Section 502(a)(3) actually applied, concluding only that it "plausibly" applied (thus supporting federal jurisdiction), and neither *Sanders* nor *Gauf* examined whether, though restitution and injunction remedies *sometimes* are available in equity, such remedies were typically available for money claims of the sort at issue here. The Seventh Circuit subsequently questioned *Gauf* and *Sanders* for just this reason. *See Wal-Mart*, 213 F.3d at 401 (questioning apparent view of *Gauf*, and of *Sanders*, that "all claims of reimbursement by an ERISA plan [are] equitable").

[21] *See Healy v. Commissioner*, 345 U.S. 278, 282-83 (1953) ("A constructive trust is a fiction imposed as an equitable device for achieving justice. It lacks the attributes of a true trust, and is not based on any intention of the parties.") (footnote omitted); Restatement of Restitution § 160, Comment *a* at 641 (a constructive trust "is in fact something quite different from an express trust"; they "are not divisions of the same fundamental concept," but "distinct concepts"); 5 Scott Treatise § 461 at 301; *id.* § 462.1 at 310-13.

equitable actions against beneficiaries: (i) "to enforce an agreement by a beneficiary to pay money into a trust" (US Br. 18, citing 3A A. Scott & W. Fratcher, *Law of Trusts* § 252 at 366 (4th ed. 1988); Restatement (Second) of Trusts § 252 at 635-36); and (ii) "for repayment of an advance made by the trust" (US Br. 18, citing Restatement (Second) of Trusts § 255 at 640-42; 3A Scott Treatise §§ 251, 252 at 363, 366).[22]

There are two fundamental flaws with this argument. First, the argument that the special equity-court powers applicable to trusts define the reach of Section 502(a)(3) is just what the Court rejected in *Mertens*, which held, instead, that Congress was referring in that provision to the remedies *generally* available from equity courts for claims of a particular type. Second, and in any event, the United States has not established that a trustee could bring *in equity* either of the two types of claims against a beneficiary urged as analogous.

The cited Sections 252 and 255 of the Restatement (Second) of Trusts (which are specific examples of a general principle stated in Section 251), as well as the cited sections from the Scott treatise, are by their terms about the right of a trustee to *charge the beneficiary's interest in the trust* in order to capture money owed the trust—which is simply not at issue here. They do not even address the mechanisms by which the trustee may press a separate claim against the beneficiary. Indeed, the commentary to Section 251 makes clear that this special self-help, setoff-type remedy (the trustee deducts the amounts from the beneficiary's interest in the trust) is different from the usual remedies the trustee may pursue against persons generally who should be liable in

[22] The United States notes also that equity entertained suits "against a beneficiary for instigating a breach of trust and to restore payments improperly made to the beneficiary from the trust." US Br. 18. Because the preconditions of that standard (breach of trust, improper payment from the trust) are absent in cases like the present, the United States does not invoke that analogy here. *Id.*

some way to the trust, cross-referencing Section 280 particularly. § 251, Comment *a* (vol. 1 at 633). Strikingly, Section 280 (vol. 2 at 38-42) *denies* that all suits become equitable just because the trustee is pursuing a trust claim: it provides that claims retain their usual legal or equitable status, without regard to the fact that it is a trustee bringing them. The Restatement, in short, defeats the attempt to rely on the trust character of the claimant as sufficient to make otherwise-legal claims against beneficiaries equitable.

This Court, in fact, has recognized in a related context that suits by a trustee for set-off are very different from suits by a trustee for money owed generally. The Court has thus held that a bankruptcy trustee may bring an equitable claim when it seeks money from a creditor who has submitted a claim against the estate but must bring a legal claim when it seeks money from a creditor who has not. *Langenkamp*, 498 U.S. at 44-45; *Granfinanciera*, 492 U.S. at 58-59; *see id.* at 43 ("'Whether a trustee's suit should be at law or in equity is to be judged by the same standards that are applied to any other owner of property that is wrongfully withheld.'"), quoting *Buzard v. Houston*, 119 U.S. 347, 352-53 (1886). So, too, here: that a trustee might assert an equitable charge against the continuing trust interest of a beneficiary does not mean that the trustee has an equitable, rather than a legal, claim for payment from other funds.

4. *Alternative Remedies.*

The general unavailability of equitable relief for claims like petitioners' cannot be circumvented by saying that equitable relief was available where legal remedies were not. US Br. 26. To bring within Section 502(a)(3) any remedy that equity *could* provide, even if it did so only "sometimes" (Pet. Br. 21, citing Dobbs (1993), § 3.1 at 279-80), is to adopt the very test *Mertens* rejected over a vigorous dissent. More particularly, it would simply reverse the congressional rejection of a damages remedy under Section 502(a)(3), as established by

Mertens, if the unavailability of damages elsewhere formed the basis for bringing the same relief within Section 502(a)(3).

In a similar vein, petitioners suggest that, unless their suit is deemed one for "equitable relief," ERISA plans would lack a remedy to enforce rights of recovery. Pet. Br. 29; *see id.* at 36. As explained in Argument II, Part C, *infra*, the premise of this argument has not remotely been established. Beyond that, however, this argument runs squarely into *Mertens*. This Court there established the standard circumscribing the reach of "equitable relief," despite the evident consequence that some harms would go unredressed by restricting remedies to only a subset of the full range of remedies that the legal system, through its various courts, has traditionally found needed. *See Reich*, 33 F.3d at 757 (*Mertens* "strips the pension funds, or . . . their surrogate the Department of Labor, of their principal remedy—a suit for damages"). In fact, given the scope of preemption under ERISA and the carefully limited remedies provided by ERISA itself, it is well accepted that those injured in the normal course of plan administration—including injured in non-monetary ways—will sometimes lack corrective remedies. *E.g.*, *Bast v. Prudential Ins. Co.*, 150 F.3d 1003 (9th Cir. 1998) (wrongful death from delayed authorization for treatment); *Cannon v. Group Health Service of Oklahoma, Inc.*, 77 F.3d 1270 (10th Cir. 1996) (wrongful death from delayed authorization for treatment); *Tolton v. American Biodyne, Inc.*, 48 F.3d 937 (6th Cir. 1995) (suicide resulting from refusal to authorize psychiatric benefits under the plan); *Spain v. Aetna Life Ins. Co.*, 11 F.3d 129 (9th Cir. 1993) (wrongful death from withdrawn authorization for surgery); *Kuhl v. Lincoln National Health Plan*, 999 F.2d 298 (8th Cir. 1993) (wrongful death from delayed authorization for surgery); *Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321 (5th Cir. 1992) (wrongful death of unborn child from denial of authorization for hospitalization); *Settles v. Golden Rule Ins. Co.*, 927 F.2d 505 (10th Cir. 1991) (wrongful death).

D. Petitioners Cannot Rely On Federal Common Law

Petitioners argue that federal common law can supplement Section 502(a)(3) if that section does not afford them the relief they seek. Pet. Br. 32-37. This argument must be rejected for multiple reasons. *First*, petitioners did not present any such question in their petition for certiorari, which was entirely about the scope of Section 502(a)(3). Pet. i, 10. *Second*, petitioners made no such contention in the court of appeals, in which, as in their certiorari petition, they argued only for coverage by Section 502(a)(3). C.A. Brief for Appellants 16-31. *Third*, this Court has made clear that carefully crafted statutory regimes are not to be supplemented by judicial creation of additional federal common law remedies. *See Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981); *Milwaukee v. Illinois*, 451 U.S. 304 (1981). Such supplementing of statutory remedies is quite different from judicially developing legal principles *under* statutory directives, as when "develop[ing] a 'federal common law of rights and obligations under ERISA-regulated plans'" in the course of adjudicating the ERISA cases actually authorized by Section 502. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989), quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987).

II. IF PETITIONERS' CLAIM IS FOR EQUITABLE RELIEF, IT IS NEVERTHELESS NOT FOR APPROPRIATE EQUITABLE RELIEF

Even if the Court concludes that petitioners' suit seeks "equitable relief," the suit should nevertheless fail under Section 502(a)(3)'s additional requirement that the suit be for "appropriate" equitable relief. Petitioners' suit does not seek

"appropriate" relief. Rather, it pursues its remedy through a duplicative proceeding harmful to ERISA and other recognized interests without a demonstrated need to bear such harms.

A. Section 502(a)(3) Requires That Any Equitable Relief Be Appropriate, Considering More Than Just Its Responsiveness To The Asserted Wrong

The language of Section 502(a)(3) requires not only that a plaintiff's claim be for "equitable relief," but also that the relief sought be "appropriate." 29 U.S.C. § 1132(a)(3). This Court confirmed in *Varity Corp.* that appropriateness, as the statutory language indicates, is a second requirement for inclusion within Section 502(a)(3): in a case where the relief before the Court (an order of reinstatement in a benefit plan) was unquestionably equitable (*see* 516 U.S. at 495), the Court separately stressed that "the statute authorizes '*appropriate*' equitable relief" (*id.* at 515) (emphasis in original). If (as hereafter assumed) petitioners' claim for relief is deemed to be "equitable," it nevertheless should be held not appropriate, hence outside Section 502(a)(3) for that distinct reason.

In determining whether a claim for relief, even if "equitable," is "appropriate," it is relevant to consider more than simply whether the relief would redress the asserted wrong. The Court has made clear that one such consideration is whether other avenues are available to protect the legitimate interests of the plan participants. *Varity Corp.*, 516 U.S. at 515 (citing *Russell*, 473 U.S. at 144). The Court has also made clear that it is relevant, too, whether allowing pursuit of the claim would conflict with ERISA policy, as would needlessly increasing litigation expenses, to the detriment of beneficiaries as well as plans. *See id.* at 497 (avoiding high "litigation expenses" is a congressional purpose). It should also be relevant whether allowing the suit presents the sort of substantial potential for friction between

federal and state courts that, in various other contexts, has weighed against federal courts exercising authority they might otherwise have.[23] Those principles, while often articulated in "abstention" settings, have a natural place in determining what relief is "appropriate."

B. Recognizing Reimbursement Claims Under Section 502(a)(3) Would Authorize Harmful Duplicative State And Federal Court Litigation

The interpretation of Section 502(a)(3) urged by petitioners would inherently lead to the very difficulties that, at least unless shown to be unavoidable, should render the suits authorized by that interpretation not "appropriate." In particular, the proposed interpretation automatically authorizes duplicative litigation, with a federal court ERISA action intrinsically related to and overlapping with the underlying state-court tort suit (which cannot be made to disappear). It makes no sense to generate the resulting

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[23] *See, e.g., Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 717-18 (1996), quoting *Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 500-01 (1941) ("'history of equity jurisdiction is the history of regard for public consequences,'" including prominently "'the avoidance of needless friction with state policies'" or state courts); *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995) (abstention in light of state proceeding considers factors, such as "the assumption by either court of jurisdiction over a res, the relative convenience of the fora, avoidance of piecemeal litigation, the order in which jurisdiction was obtained by the concurrent fora, whether and to what extent federal law provides the rules of decision on the merits, and the adequacy of state proceedings"); *see also* Dobbs (1993), § 2.5 at 123 ("equitable relief may be denied . . . for reasons of convenience or policy, as where enforcement of an injunction . . . might interfere with resolution of the case by other courts, agencies or departments"); *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 586 (1999) ("Cooperation and comity, not competition and conflict, are essential to the federal design."); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) ("courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction" (internal quotation marks omitted)).

increase of litigation costs and of occasions for federal-court-caused disruption of state-court proceedings where, as shown in the next point, petititioners have not demonstrated that ERISA plans are unable to protect their interests by participating in the state-court suit.

Except for claims by injured persons settled without even filing a tort suit (which is not the case here), the suit petitioners would have this Court authorize will always be a second suit associated with the underlying tort suit. The tort suit will typically be in state court, and nothing about the federal court proceeding will terminate the state court case. Petitioners' view of Section 502(a)(3) is thus a prescription for regular duplicative litigation, one case in federal court and the other closely related case in state court.

Such duplicative litigation adds expense, as the parties must appear in a new forum, familiarize a new judge with the issues, and ensure coordination of the proceedings. The added costs must be borne by the beneficiary or participant and by the plan itself. Furthermore, the federal court proceedings may delay or even prevent the completion of the state court proceedings that generate the recovery sought by the plan in the first place. Again, not only may the injured beneficiary suffer, but the plan itself may lose as well.

Separating matters that are interrelated, as petitioners propose, creates obvious difficulties of coordination and potential for state-federal conflict. The federal court may be asked, as it was here, to issue an injunction against the state court proceedings. JA 95. Those state proceedings, in turn, may involve various determinations based on the state court's distinctive familiarity with the relevant evidence, *e.g.*, about the reasonableness of the allocation to various types of damages of amounts recovered either in settlement or by judgment. There may be multiple claimants to the same pool of money, perhaps multiple liens (such as those of Medi-Cal or the attorneys), perhaps priority contests. The creation of a

new legal entity like a Special Needs Trust through a probate proceeding may be involved. A decedent's estate in probate may be involved. It makes little sense, in terms of judicial efficiency and comity, to strip out the reimbursement issue from the state-court proceeding and create two proceedings where the same *res*, the recovery amount, is in play.[24]

The ERISA plan may even be a party to the state court cases. Commonly, such plans have a subrogation right along with the reimbursement right, as petitioners asserted they had here. *See* JA 71, 77; US Br. 25 n.17; *cf.* 5 U.S.C. §§ 8131, 8132 (subrogation and reimburse-ment right of United States when injured employee recovers for medical expenses paid by United States). The two are naturally related, in that the subrogation right gives the plan the ability to step in and try to maximize the recovery by suing the alleged tortfeasor itself, if it believes that the injured beneficiary is not doing so. It is not disputed that the ERISA plan itself, as subrogee, would have to pursue the tort suit in state court, often alongside the injured beneficiary as a co-plaintiff: the subrogee simply "stands in the insured's shoes against the third-party tortfeasor" in whole or in part (US Br. 25 n.17) and pursues the claim.[25] It makes little sense to permit the

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[24] For such reasons, the Court has recognized the special ability of bankruptcy, probate, or other *in rem* proceedings to generate final dispositions of property to foreclose the interests of those who may not actually have been parties (at least if they had notice). *See Richards v. Jefferson County*, 517 U.S. 793, 799 (1996); *Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989).

[25] A subrogee steps into the place of the subrogor, with whatever rights the subrogor had. *See United States v. California*, 507 U.S. at 756; *Reliance Nat. Indemn. Co. v. General Star Indem. Co.*, 72 Cal. App. 4th 1063, 1078 (2d Dist. 1999). It follows that what is acquired—the tort claim itself—remains legal (under state law rules) if it was legal (and based on state law) in the first place. *See* 58 Cal. Jur. 3d Subrogation § 31 at 680. ERISA does not transform the tort claim into a federal law claim under ERISA. *See, e.g., American & Foreign Ins. Co. v. Bolt*, 106 F.3d

ERISA plan, after litigating the case in state court to generate a recovery, to file a separate federal-court suit to litigate the distribution of the same money. And it makes little sense for any rule under Section 502(a)(3) to treat reimbursement and subrogation differently: the source of the money sought is the same, and an ERISA plan can be written to include either one.

C. Petitioners Have Not Shown The Duplicative Litigation To Be Necessary To Protect Plan Interests

The inherent costs accompanying petitioners' view of Section 502(a)(3)—costs to beneficiaries, to the federal and state judiciaries, and to plans—should not be authorized in the absence of a showing that they are unavoidable. It need not be questioned that ERISA-covered plans have a legitimate interest in securing recovery, out of alleged tortfeasors' payments to an injured beneficiary, of money spent on her medical care. Petitioners, however, have not come close to showing that ERISA plans cannot protect their interests by resort to state-court mechanisms, avoiding duplicative litigation.

An ERISA plan can write its provisions to state clearly the recovery to which it is entitled and (like this one) to give itself a lien on recoveries. An ERISA plan also can write a subrogation right, entitling it, upon paying a beneficiary's medical claims, to step into her shoes as a plaintiff (alone or with her) in suing the alleged tortfeasor in state court. Indeed, according to Great-West itself, in both its letter to Eric Knudson and the Right of Recovery Agreement that it drafted, the Plan in this case already had the right to participate in the state-court action, as a subrogee of the claim

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155 (6th Cir. 1997) (subrogee action as jury action); *Cigna Ins. Co. v. Oy Saunatec, Ltd.*, 241 F.3d 1 (1st Cir. 2001) (same); *Granite State Ins. Co. v. Smart Modular Technologies, Inc.*, 76 F.3d 1023 (9th Cir. 1996) (same).

against Hyundai or otherwise. JA 71, 77. Petitioners have never disputed that, at a minimum, California procedural law permitted them to intervene in respondent's suit against Hyundai, whether before or after the conditional settlement was reached, to assert their interests and demand the share to which they were entitled of the recovery amount within the jurisdiction of the state court. *See* JA 238.[26]

Petitioners argue, however, that state-law relief is preempted, citing in support only one decision, that of a California intermediate appellate court in a case not involving a comparable proceeding. Pet. Br. 29-30, quoting *Jefferson-Pilot Life Ins. Co. v. Krafka*, 50 Cal. App. 4th 190 (2d Dist. 1996) (state law contract cause of action for a money judgment preempted; no issue of enforcement of a lien in state court or assertion of a claim against an alleged tortfeasor as subrogee). For its part, the United States carefully refrains even from asserting that "a cause of action . . . under state law to enforce a reimbursement term of a plan" would be preempted; instead, it says only that it "*presumably*" or "*likely*" would be, without further discussion of the ways in which plan rights might be asserted. US Br. 20 (emphases added).

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[26] *See* Cal. Code Civ. Pro. § 387 (intervention); *Olszewski v. ScrippsHealth*, 107 Cal. Rptr. 2d 187, 206 n.17 (4th Dist. 2001); *Plut v. Fireman's Fund Ins. Co.*, 102 Cal. Rptr. 2d 36, 40 (Ct. App. 2d Dist. 2000) ("'the insurer's safest course in order to preserve its subrogation rights is to seek intervention in the underlying action' brought by the insured against the legally responsible party"); *Donohue v. Highlands Underwriters Ins. Co.*, 198 Cal. App. 3d 1176, 1181 (1st Dist. 1988); 39 Cal. Jur. 3d (Rev.) Insurance Contracts § 653 at 517-18 (insurer may intervene or directly sue alleged tortfeasor). For federal court analogs, see, *e.g.*, 7C C. Wright, A. Miller, & M. Kane, *Federal Practice & Procedure* § 1908 at 272, 274-75 (1986) (intervention); 6A *id.* § 1546 at 362 (1990) (intervention or joinder); *United States v. Aetna Cas. & Sur. Co.*, 338 U.S. 366 (1949); *Counihan*, 194 F.3d at 361-62; *Ghazarian v. Wheeler*, 177 F.R.D. 482, 485-86 (C.D. Cal. 1997).

In fact, the decisions of this Court do not require preemption of state-court proceedings to determine rights in a recovery from third parties. A state law may be preempted if it has "reference to" ERISA plans, *i.e.*, if it "acts immediately and exclusively upon ERISA plans" or "the existence of ERISA plans is essential to the law's operation." *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 325 (1997). But general state law allowing intervention to assert liens on recovery amounts in the litigation, or to adjudicate a subrogee's state-law claim in conjunction with the subrogor's, plainly does not fall within that class. The inquiry therefore is whether such state law has "a connection with" ERISA plans, the second branch of preemption. *Id.*

Under *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995), and its successors, the determination of such a "connection" begins with "the normal presumption against pre-emption" (*De Buono v. NYSA-ILA Medical and Clinical Serv. Fund*, 520 U.S. 806, 813 (1997)) and focuses on any practical conflict with ERISA policy, based on "'the objectives of the ERISA statute'" and "the nature of the effect of the state law on ERISA plans." *Dillingham*, 519 U.S. at 325; *see Egelhoff v. Egelhoff*, 121 S. Ct. 1322, 1327 (2001). Preemption has been found in two circumstances (*see Travelers*, 514 U.S. at 658): where state law required plan choices, about benefit payments or other plan terms, different from those which might be voluntarily made [27]; and where state laws subjected

[27] *See Egelhoff*, 121 S. Ct. at 1327 (state law that "binds ERISA plan administrators to a particular choice of rules for determining beneficiary status"); *Boggs v. Boggs*, 520 U.S. 833 (1997) (state law permitting transfer of pension benefits to person other than plan-designated person); *FMC Corp. v. Holliday*, 498 U.S. 52 (1990) (state law barring adoption of subrogation provision); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985) (state law requiring minimum mental-health benefits); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983) (state law prohibiting

plans to remedial liabilities beyond those Congress authorized.[28] Preemption has thus turned on inconsistency with plan choices or with congressional choices about the scope of liabilities. The Court has stated that "[t]he basic thrust of the pre-emption clause" is "to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans" (*Travelers*, 514 U.S. at 657) and thus has focused on whether types of state laws subject plans to "'conflicting directives'" (*id.* at 662). *See Eglehoff*, 121 S. Ct. at 1328; *FMC Corp. v. Holliday*, 498 U.S. 52, 59-60 (1990); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9-11 (1987); *see also Egelhoff*, 121 S. Ct. at 1330 (suggesting that state laws that are well-established, with long pre-ERISA history, and "more or less uniform nationwide," whose "interference with the aims of ERISA" is questionable, might not be preempted); *Dillingham*, 519 U.S. at 332 n.10..

The state-court mechanisms for plans to enforce reimbursement rights do not involve the circumstances that have led to holdings of preemption. The state court, in such proceedings, must follow the terms of the ERISA plan as chosen by its sponsors, and as construed in light of relevant federal law principles; there is no interference with plan drafters' or administrators' choices. Nor is there imposition of any additional liability on plans or, for that matter, on beneficiaries or participants. Indeed, such state-law

certain plan benefits choices as discriminatory); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981) (state law barring reduction of plan benefits by amount of workers' compensation award).

[28] *See Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987) (state-law claim seeking extracontractual damages); *Pilot Life, supra* (same); *see also Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990) (in addition to express preemption of state cause of action as one having "reference to" ERISA plan, also finding conflict preemption, where in fact plaintiff was seeking extracontractual damages, 498 U.S. at 481, subsequently held unavailable under ERISA § 502(a)(3) in *Mertens*).

proceedings offer remedies *for* plans, giving them exactly what they are entitled to receive. Most pointedly, if (contrary to Argument I above) the relief the Plan seeks is "equitable," there is no basis for saying that Congress "rejected" the relief that a state court would afford the Plan, namely, its share of the state-court recovery as determined according to the terms of the plan. *Pilot Life*, 481 U.S. at 54.

If petitioners cannot complain about the relief they would get, or the rights on which the relief would be based, they equally cannot charge that preemption would unify proceedings in federal court or allow a more uniform administration without need for individualized decision-making. The underlying state-court tort case remains; it cannot be transferred to federal court, even if the plan participates as subrogee; and the plan must monitor the individual case regardless of its ability to proceed in federal court, making case-specific judgments about that case and what the Plan may, or should, demand. Any interest in preemption, therefore, can only come down to the abstract concern that particular state courts might come to different interpretations of ERISA plans than would particular federal courts—though federal courts themselves may disagree and, here, the state and federal courts actually agreed about the meaning of petitioners' plan terms. But there is no basis for denigrating the ability or readiness of state courts to remain faithful to the terms of ERISA plans and any federal-law interpretive principles. And ERISA policy is affirmatively advanced by keeping litigation costs down and not interfering with the resolution of state court cases that produce the recoveries that plans seek in the first place.

The absence of preemption of the state-court proceedings at issue is reinforced by this Court's upholding of state-court enforcement mechanisms in *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825 (1988). The Court there held that ERISA does not preempt the application to

ERISA-governed plans of general state-law processes, in state court, for garnishing plan benefits, ruling broadly that "state-law methods for collecting money judgments," including federal court judgments, are simply outside the scope of Section 502, yet plainly contemplated by Congress to be available, and thus "must, as a general matter, remain undisturbed by ERISA." *Id.* at 833-34. The Court explained particularly that the garnishment process at issue, which involved an order of a state court (*see id.* at 828), was a "'procedural' mechanism" only, "creat[ing] no substantive causes of action, no new bases for relief, or any grounds for recovery"—all of which would be matters of federal law where federal law supplied the basis for the garnishment, as when the judgment being enforced (in state court) was a federal-court judgment. *Id.* at 834 n.10. *See Peacock v. Thomas*, 516 U.S. 349, 353 (1996) (citing *Mackey*); *Travelers*, 514 U.S. at 662 (same).

The neutral state-court mechanisms for enforcing a plan lien or subrogation right likewise do not depend on creation of a new substantive cause of action or new basis for relief or ground for recovery. *Mackey*, 486 U.S. at 834 n.10.[29] In that context, preemption would work to undermine, not protect, the interests of ERISA participants, beneficiaries, and plans. Petitioners, who did not attempt to participate in the state court proceeding to test any speculation about preemption, have not shown that ERISA preempts the state-court

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[29] A lien-enforcement mechanism does not involve *in personam* liability at all, but is an *in rem* procedure. On the distinction in various contexts, see, *e.g.*, *Johnson v. Home State Bank*, 501 U.S. 78, 84 (1991) ("a bankruptcy discharge extinguishes only one mode of enforcing a claim—namely, an action against the debtor *in personam*—while leaving intact another—namely, an action against the debtor *in rem*"); *United States v. Rodgers*, 461 U.S. 677, 694-95 (1983) (tax lien enforcement); *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 501 (1998) (admiralty); *Mercy Hosp. & Medical Ctr. v. Farmers Ins. Group*, 15 Cal.4th 213, 217 (1997).

mechanisms that are distinctly preferable in terms of ERISA policy and otherwise. With no basis for concluding that the various costs of a separate federal action under Section 502(a)(3) need to be borne, that action, even if "equitable," should be found not "appropriate" and thus held outside the scope of Section 502(a)(3).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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